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No.

LONE STAR GAS COMPANY, Appellant

v.

STATE OF TEXAS, et al., Appellees

Appeal from the Court of Civil Appeals, [illegible]
Judicial District of Texas

MOTION TO DISMISS APPEAL

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AUTHORITIES.

List of Cases (continued):

SUPREME COURT OF THE UNITED STATES

October Term, 1937

No. 313

LONE STAR GAS COMPANY, *Appellant*,

v.

STATE OF TEXAS, ET AL., *Appellees*

Appeal from the Court of Civil Appeals, Third Supreme Judicial District of Texas

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REPLY BRIEF FOR APPELLANT

Not perceiving how the Court will be aided by appellees' Introductory Statement (1-4) especially their general characterizations of our brief, we attempt no reply in kind, and immediately take up specific points.

DIVISION ONE.

The Interstate Commerce Questions.

With a few unimportant exceptions, every point of argument presented by the appellees in their dis-

cussion of the interstate commerce defense was presented to this Court in *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298, as the Court will see from an examination of the reported brief for the appellant in that case (265 U. S. 299, 304). This applies to the point that appellant's business is essentially a local business, properly subject to local regulation (265 U. S. 299, 302); and to the points of argument based upon the maintenance of delivery facilities, including regulators and meters at the city gates (265 U. S. 300, 302); and to the points of argument based upon the fact that the destination of any particular part of the gas is not known by the pipe line company in advance and deliveries are made *instanter* in response to the demands created by local consumption (265 U. S. 300-301); and to the point based upon the non-action of Congress (265 U. S. 302-303).

These points of argument were sustained by the decision of the State court in that case *(State v. Kansas Natural Gas Co.*, 111 Kan. 809). That decision was unanimously reversed in this Court.

And most of the points of argument presented by the appellees here were also presented to this Court in *State Commission of Mississippi v. Interstate Natural Gas Co.*, 284 U. S. 41, as appears from the report of appellant's brief in that case. This applies to the nature of the contracts, reliance on deliveries as "breaking the original package" and the local maintenance and use of "taps, regulators, thermometers, and meters" (284 U. S. 41-42).

We refer also to *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, 468, 470; *Public Utilities*

omm. v. Attleboro, 273 U. S. 83, 90; *Peoples Natural Gas Co. v. Public Service Comm.*, 270 U. S. 550, 53; and *State Corporation Comm. v. Wichita Gas o.*, 290 U. S. 561, 563. The recent decision of this ourt in *Southern Natural Gas Corporation v. Alaama*, 301 U. S. 148, 155, is not in conflict with the ecisions referred to. In that case the company as maintaining not only local delivery facilities but ocal supply lines designed and installed to meet ocal consumer demands. The decision merely fols the rule announced in *East Ohio Gas Co. v. ax Commission* and earlier cases, and holds that the upplying of the demand of local consumers, howver conducted, is essentially a local business. Here, contrast, appellant, in making city gate delivries, is selling gas, not to ultimate consumers, but o retailers who, in turn, sell to ultimate consumers. ts delivery facilities and other activities are only uch as are appropriate to the conduct of its wholeale business. And the burner tip rates of the local etailing companies are not involved.

Appellees are, in effect, inviting the Court to reiew anew and reverse *Missouri v. Kansas Natural Gas Co., supra,* and the other cases referred to that ollow that decision.

I.

Reliance by Appellees on Matters Outside the Record.

(1) *The Railroad Commission Record.*

On page 3 of their brief appellees refer to the Railroad Commission record that was excluded from

evidence in the State District Court, and also to the fact that appellant has not designated any part of this excluded record for printing. This excluded record could not be considered by the Court of Civil Appeals or the Supreme Court of Texas except for the purpose of reviewing the alleged error of the District Court in excluding it from evidence—and it was not held that the District Court had committed any such error. It was before the State appellate courts only as a part of a bill of exceptions complaining of its exclusion from evidence. It is here in the same way, but it cannot be considered here for any purpose because no one is now complaining of the action of the District Court in excluding it from evidence.

Since this excluded Railroad Commission record was not considered by the State courts in testing the validity of the rate order, appellant did not designate any part of it for printing. Under the Texas review procedure a trial like this is *de novo* with all that that term imports. But this does not mean that the same evidence heard by the Railroad Commission may not be heard by the reviewing court. It means only that the evidence must be heard *de novo*. Either party is free to produce the same witnesses and offer the same evidence in open court instead of a transcript of their testimony given before the Commission. There is no evidence, or even contention, that the appellees were denied in the District Court the right to place the same witnesses on the stand and offer *de novo* their testimony and other evidence previously offered before the Commission.

On pages 32 and 33 of their brief appellees refer to this Commission record and invite the Court to consider it in support of their Point I. It is obvious that this excluded Commission record cannot be considered for any purpose. It is true that appellant stipulated with appellees that the original excluded record might be brought up to this Court, but this was done only after appellees in their State court praecipe had called for the inclusion of this Railroad Commission record as a part of the record to be forwarded to this Court. (V, R. 3485-3487.) By thus bringing here something that was by the State court excluded, and no part of the Statement of Facts on which the rate order was reviewed, appellees are unable to convert it into something else. Authentication denied in the State courts can not be supplied here.

(2) *"Statement of Facts of Hearing on Plea in Abatement and Pleas to Jurisdiction."*

The record shows that appellant filed in the State District Court certain pleas to the jurisdiction and plea in abatement and that a hearing was had before the court on these pleas before the beginning of the trial on the merits. (I, R. 123-133; 171; 301.) Evidence was heard on these pleas, and it appears in the printed record, having been designated for printing by the appellees (I, R. 215-300); it appears under the heading "Statement of Facts of Hearing on Plea in Abatement and Pleas to Jurisdiction" (I, R. 215). These pleas were addressed to the court and there was of course no jury trial. The pleas

were overruled on May 30, 1934 (I, R. 171). The trial on the merits was begun before a different judge and a jury on June 11, 1934—after the plea in abatement had been overruled (I, R. 197, 301). The evidence heard by the court and jury on the merits begins in the printed record in Volume I, page 301, under the heading "Statement of Facts of Trial on the Merits." The evidence heard on the pleas to the jurisdiction and in abatement was not offered in evidence on the trial on the merits. It was never placed before the court and jury that settled the issues of fact relating to the validity of the challenged order. In these circumstances, the Statement of Facts introduced before the judge who heard these pleas constitutes no part of the evidence heard by the court and jury on the merits.

An examination of appellees' brief will show that a large number of the references made to the record, especially in the discussion of the interstate commerce questions, are to this plea in abatement record. Illustrating, we refer to pages 34, 35, 36, 54, 55 and 56 of appellees' brief.

It is true that appellant joined appellees in stipulating that the "entire State court record" might be certified by the clerk of the State court to this Court, but this was done only after appellees had filed a counter praecipe in the State court that designated the "entire State court record" (V, R. 3485-3487). This stipulation did not and could not make the record of the evidence heard on the pleas to the jurisdiction and in abatement a part of the evidence heard in testing the validity of the rate order. The evidence heard on the pleas referred to is a part of

the "entire State court record," but it is not a part of the evidence heard in the State court on the trial on the merits. So to consider it would be to change the "State court record."

It thus appears that appellees have designated for printing and are relying upon the evidence heard on these pleas to the jurisdiction and in abatement—evidence that relates only to the legal issues tendered by the pleas referred to and that was heard by a different judge, and without a jury, more than a week before the trial on the merits was begun (V, R. 171, 301).

II.

Discussion of Contention That Appellant Is Estopped to Assert Its Interstate Commerce Defense.

Appellees assert that in the proceedings before the Railroad Commission appellant made no objection to the proposed rate grounded on the Commerce Clause of the Federal Constitution and that appellant "is now thereby estopped to assert such attack or defense in any form for the first time in a judicial review of the Commission's order." (Brief, 4, 5; also 32, 33.) As to this Appellant submits:

(1) The Commission record was excluded from evidence, as appellees admit. (Brief, 3.) Counsel for appellees go outside the record on the merits when they invoke it as they do. They invite this Court to decide the merits of the interstate commerce

issue by considering an alleged fact not in evidence before any one of the State courts.

(2) The theory of estoppel here set forth is asserted originally in this Court. In the State District Court appellant pleaded its interstate commerce defense against the rate order. (I, R. 136-138, 147, 148, 150.) Appellees filed their supplemental petition by way of reply to this defense but wholly failed to plead the estoppel or waiver that is now asserted by them in this Court (I, R. 153, 161). There is no reference to any failure on the part of appellant to assert the interstate commerce defense before the Commission.

If appellees had believed that appellant was estopped to assert the interstate commerce defense, the estoppel should have been pleaded in the court in which the defense was first asserted—the State District Court. Appellees were in no way prevented from pleading this estoppel and offering evidence *de novo* in support of it. This right was not denied by the District Court's exclusion of the Commission record. Notwithstanding the exclusion of that record, either party was given the right to offer any and all material evidence *de novo* and if this estoppel theory had any material bearing on the interstate commerce issue it was open to the appellees to plead it in their reply pleading, as the state practice requires, and offer evidence *de novo* in support of it.

(3) The estoppel here asserted is grounded upon the assumption that appellant knew at the beginning and during the progress of the Commission hearing

what kind of findings and order would be made and promulgated at the end of the hearing. There is of course no basis for this assumption. Appellant did not know that the Commission would attempt to exercise a power it did not possess until the findings were filed and the order promulgated. It appears from the record that the Commission hearing was concluded on the 29th day of June, 1933, and the order was not promulgated and the findings filed until the 13th day of September, 1933 (III, R. 1608.) Immediately thereafter appellant filed its suit assailing the Commission's order and invoking the protection of the Commerce Clause. Appellant acted as soon as the nature of the order was known.

Furthermore, the trial in the District Court was *de novo* and the failure of a party to assert a given defense before the Commission has no effect on his right to assert that defense in the reviewing court.

(4) It is asserted by appellees that appellant "lay in ambush for the Commission" and permitted the Commission to promulgate the order without "the slightest hint of the claimed defense of interstate commerce." (Brief, p. 5.) The record shows that the Commission knew that appellant was engaged in interstate commerce. The Commission at the conclusion of the hearing and in its findings made a part of the order found as a fact that appellant was engaged in interstate and intrastate commerce "in the selling of gas to some 300 cities and towns in the States of Oklahoma and Texas."

III.

The Wheeler County Gas Is Interstate Gas and the Rate Order Is Void as Applied to It.

(1) *The Handling of this Gas constitutes Interstate Commerce.*

Appellees declare that the gas transported through Line A is not "inherently interstate gas but is in fact and in law intrastate commerce since both termini are in Texas" (Brief, p. 13). They cite *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, and later cases following that decision. (Explained, appellant's brief, 69-70.)

United States Express Co. v. Minnesota, 223 U. S. 335 is cited. That case involved a gross receipts tax apportioned in accordance with line mileage located within and without the State, and no attack was made on the method of apportionment. The case therefore is distinguishable upon the grounds pointed out by Mr. Justice Holmes in the *Hanley* case.

Ewing v. City of Leavenworth, 226 U. S. 464, involved a tax levied solely upon business done in the City of Leavenworth "in receiving packages from points within the State and in transporting packages to like points." The tax levied was a flat license tax of $50.00, and the ordinance levying it excluded interstate and Government business. The Court in its opinion distinguished the *Hanley* case because it involved the fixing of a rate, and not the levying of a tax (226 U. S. 468, 469).

Wilmington Transportation Co. v. California Railroad Commission, 236 U. S. 151, is not in point. In

that case, the Transportation Company was engaged as a common carrier of passengers and goods by sea between San Pedro, on the mainland, and Avalon, on Santa Catalina Island, both places being within Los Angeles County, California. The California Commission undertook to prescribe its rates. The vessels used by the company in direct passage between the two ports traversed the high seas for a distance of 20 miles. They did not touch at any other port of either the United States or any foreign country. They did not on the voyage take on or put off any article of commerce. The rate making authority of the Commission was sustained upon the ground that jurisdiction to fix the rates was vested either in Congress or in the State of California, and Congress had not acted. The *Hanley* case was distinguished on the ground that the line of railway passed through the territory of another State. As to the *Hanley* case the Court said:

"The regulation of such rates cannot be 'split up' according to the jurisdiction of the respective States over the track; there must be one rate fixed by one authority. *Hanley v. Kansas City Southern Ry.*, 187 U. S. 617, 620."

The Court further said:

"We are not here dealing with the case of property which is in course of continuous transportation to another State or to a foreign country. (Citing cases.) It must be assumed upon this record that the State claims the right to exercise its authority only as to transportation between the mainland and the island, and solely with respect to such shipments over this route as are local to the State, both as to

the beginning and the end of the transportation. There is no passage through the territory of another State; the transportation, in its entire course, is subject to a single authority—either that of Congress or that of the State—and the latter would yield to the exercise of the former. The sovereignty of no other jurisdiction is encountered." (236 U. S. 156.)

Here the facts are entirely different. The pipe line is located in both States. Deliveries of gas are made in both States on the main line as well as on the branch line running north of Oklaunion, Texas. The right of Oklahoma to fix rates applicable to the Oklahoma deliveries stands on as strong a footing as does the right of Texas to fix the rates applicable to the Texas deliveries. Both States have statutes authorizing their regulatory commissions to fix rates and to regulate conditions of service, including the apportioning of an inadequate supply. The probability of a conflict in the exercise of regulatory power is obvious. *Buck v. Kuykendall*, 267 U. S. 307, 315, 316.

(2) *Inasmuch as the order amounts to a direct regulation of interstate commerce, the non-action of Congress is not material.*

This Court in some of its later decisions has declined to give controlling effect to descriptive words such as "direct" and "indirect" in determining whether a given State regulation operates as a "regulation" of interstate commerce "in a constitutional sense." But however the burden or restraint here imposed may be described, it is clear that no burden

or restraint could be more immediate or direct in its effect.

If the challenged regulation levied a gross receipts tax indiscriminately on appellant's interstate and intrastate business, it would not stand; under the decisions of this Court, it would be regarded as imposing a "direct" and prohibited burden on interstate commerce. *Cooney v. Mountain States Tel. Co.*, 294 U. S. 384, 392. Compare *Pacific Telephone & Telegraph Co. v. Washington*, 297 U. S. 403, 416. Is there any factual difference, favoring the validity of the exercise of State authority, between a regulation that would exact 20 per cent of appellant's gross receipts from sales of gas in the form of a tax, to be paid into the state treasury, and another regulation that would prevent appellant from collecting the 20 per cent at all? It is plain, whether viewed from a practical or legal standpoint, that the second regulation is not less "direct" in its restraint than is the first. Both subtract 20 per cent from appellant's receipts—the first by taking the 20 per cent after it has been collected and the second by denying the right to collect it at all.

The order indiscriminately limits the amount of the gross receipts of appellant's business, the interstate part as well as the intrastate part. The restraint is more direct than would be the case if a gross receipts tax had been levied on appellant's interstate business. Such a tax would leave it still free to control its business and to make its own contracts in an attempt to make the business yield a profit notwithstanding the tax. Here appellant's contracts are stricken down by the challenged regulation and

it is told that it will not be permitted to earn more than a given amount from its interstate business. Its interstate business is placed in a legislative strait-jacket along with its intrastate business.

The 32¢ per MCF rate is not merely the price of the gas owned and sold by appellant. This rate also represents the value, fixed by the State Commission, of the use of appellant's properties, including its interstate transportation system, in the rendering of a service to the public. The record shows that appellant's transportation lines and facilities constitute 90 per cent in value of its total properties. This rate, as fixed by the State Commission, affords the only source from which appellant may obtain compensation for the use of its transportation system in making the city gate deliveries involved. The rate in large part is a transportation rate. The statute under which the Commission is acting authorizes the Commission to fix "transporting" rates, and that is what the Commission has done by the challenged order. (Appellant's main brief, p. 171.)

The applicable Texas statutes authorize the Commission to directly and separately fix city gate rates of transporting trunk pipe line companies. (Main Brief, pp. 171-173.) The Commission is not limited to the indirect consideration of pipe line charges as reasonable expense items. Compare *Western Distributing Co. v. Public Service Commission*, 285 U. S. 119, 124-125. It has the power to proceed independently and fix a pipe line rate wholly apart from the fixing of any burner tip rate, and that is the way that it has here proceeded. It has proceeded against appellant as a trunk pipe line transporter of gas for

the purpose of fixing the amount of compensation to which appellant is entitled for producing or purchasing, and transporting and delivering the gas to the city gates.

Viewing the prescribed rate as simply the price of the gas fixed by State authority, the regulation nevertheless imposes a direct burden on interstate commerce. If interstate prices are to be regulated, the regulation must come from Congress. The power to regulate the prices that may be charged upon original sale and delivery of commodities in a State, in interstate commerce, is the power to dictate the terms upon which interstate commerce may be conducted. It is plainly the power to "regulate" interstate commerce "in a constitutional sense."

We do not think it necessary to review at length the many cases cited by appellees upholding "indirect" or "incidental" regulations of interstate commerce. They may be distinguished by referring to typical cases. This is not a case like *Savage v. Jones*, 225 U. S. 501, where a State regulation was upheld which was broad enough to apply to interstate sales as well as to local sales, and was designed directly to prevent fraud in the making of sales of merchandise. It is not a case like *Bradley v. Public Utilities Commission*, 289 U. S. 92, or *South Carolina State Highway Department v. Barnwell Bros.*, decided Feb. 14, 1938, where State regulations designed to promote safety in the use of the public highways were upheld. In all of these cases and in many similar cases, the burden validly imposed caused a loss consequential in nature. There was no direct purpose or effort to regulate interstate commerce as such.

This case clearly falls within the rule laid down in *Buck v. Kuykendall*, 267 U. S. 307; *Baldwin v. Seelig, Inc.*, 294 U. S. 511; *Wabash, etc. Ry. Co. v. Illinois*, 118 U. S. 557; *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298.

In the case last cited an attempt was made to distinguish a case like this from cases involving transportation rates of railroad companies. See the appellant's brief in that case, 265 U. S. 300, 303. The attempt failed there, and for like reason it should fail here.

The case is not like *Pacific Telephone & Telegraph Co. v. Washington, supra*, where a State statute imposed an occupation tax on the intrastate part of the business; where the only direct burden imposed was on intrastate commerce; the burden of the interstate end of the business being an indirect one. In that case it was open to the complaining taxpayer to discontinue its intrastate business and thus be relieved of the indirect burden imposed on the interstate end of its business. Compare *Interstate Busses Corporation v. Holyoke Street Railway Company*, 273 U. S. 45; 51. Here it is not open to appellant to discontinue the intrastate end of its business; it owes a duty in law to continue that business. *Pullman Co. v. Adams*, 189 U. S. 420; *Pacific Telephone & Telegraph Co. v. Washington, supra*, p. 414. And if it did, that would not relieve it of the burden imposed by the State regulation on its interstate business because the rate order is inseparable and the prescribed rate falls indiscriminately on the entire business. *Sprout v. South Bend*, 277 U. S. 163. However inseparable may be the two parts of appellant's busi-

ness, the prescribed rate falls on both—on the entire business as a unit. *Cooney v. Mountain States Telephone Co., supra.*

If the suggestion should be made that it is appellant's duty to discontinue its operations on Line A entirely and attempt to supply the demand in Texas by resort to its intrastate gas, the answer is twofold:

(a) The evidence shows that appellant's intrastate gas is inadequate to supply the demand. In the gas business the demand that must be supplied is the *peak demand;* and the undisputed evidence shows that all of appellant's lines must be operated at capacity in order to supply the peak demand. (Schmidt testimony, II, R. 1490-1492.) The evidence further shows that the demands on the supply available from Line A are growing. That line is connected with the "largest natural gas field in the United States, an enormous reservoir * * * * with a width of from ten to twelve miles." *Thompson v. Consolidated Gas Co.*, 300 U. S. 55, 59.

(b) To require appellant to discontinue its interstate business in order to escape State regulation would impose a direct burden on interstate commerce. That expedient is always available where a tax burden or other regulation is imposed on interstate commerce.

(3) *The alleged fraud in constructing Line A.*

Appellees assert that a glance at the map showing Line A will disclose that the appellant had no pur-

pose in locating that line as it was located "except to attempt evasion of State regulation." (Brief, 46.) The reasons moving appellant in locating this line as it was located are detailed by the witness Schmidt (II, R. 1472-1474; 1487-1490). The witness' testimony may be summarized in his own statement: "That line was constructed entirely on engineering principles and nothing else" (II, R. 1475).

Appellees criticise the opinion of Mr. Justice Holmes in *Western Union Telegraph Co. v. Speight*, 254 U. S. 17, claiming that only two cases are cited in the opinion and "neither case is in point." Two questions were involved in the Speight case: The first question was whether the movement through more than one State is interstate commerce. That question was decided in the Hanley case, cited by Mr. Justice Holmes. The second question was whether fraud in conducting the business in a particular way was material. That question was decided in *Kirmeyer v. Kansas*, cited by Mr. Justice Holmes. The two cases are precisely in point in support of the decision announced in the Speight case.

IV.

Gas Produced or Purchased in Oklahoma—Discussion of Appellees' Points X to XIV, Inclusive.

Appellees in their Point X assert that the Oklahoma produced gas "is unnecessarily imported" into Texas; that there is "ample Texas gas available to appellant from its own reserves and from its existing and potential purchase connections in Texas to meet all of its Texas demands." In the same con-

nection it is asserted that "the continued importation" of Oklahoma gas is only an "obviously fraudulent subterfuge to avoid state regulation in Texas." (Brief, 15.)

Point XI is to the effect that "the relatively small and rapidly diminishing volume of Oklahoma-produced gas" transported into Texas is practically offset by the Texas gas transported to Oklahoma, with the result that "the interstate commerce" question is thereby eliminated. (Brief, 16.)

Point XII is to the effect that the Oklahoma importations are too small to be noticed. (Brief, 16.)

Point XIII is to the effect that the order does not require appellant to transport Oklahoma gas to Texas and that it can just as easily and as cheaply obtain Texas gas; hence, that the Oklahoma gas is subject to Texas control. (Brief, 17.)

Point XIV is to the effect that the rate order, although applying to the Oklahoma gas, does not restrict, impede or directly burden the free importation of such gas into the State of Texas.

These points follow the reasoning of the State court, which was to the effect that appellant's gas reserves in Texas "are more than sufficient to supply all Texas needs, and the gas supply of Oklahoma will likewise supply all of its needs," with the result that appellant's interstate transportation of gas between Texas and Oklahoma should be ignored (V, R. 3337, 3347).

With respect to these Points it is submitted:

(a) These Points and the rulings of the State court, substantially to the same effect, are sufficient to suggest the necessity for congressional regulation

as against State regulation of interstate commerce in natural gas. The contentions here presented show the probability of conflicting State regulations. Appellees assert that the Oklahoma consumers are not entitled "as a legal or moral right to the same rates for natural gas as are the consumers in Texas." (Brief, 63.) They assert, in effect, that appellant is discriminating in favor of Oklahoma consumers and its Oklahoma properties and operations. They would deny to appellant the right to engage in interstate commerce upon the ground that it would be just as easy for appellant to conduct its business wholly in intrastate commerce. In other words, appellant's interstate business is to be eliminated because of an alleged lack of necessity to engage in that business. Appellant is even charged with being guilty of fraud because of its transportation of gas from Oklahoma (Brief, 15).

These various contentions in this connection are answered by the decisions of this Court in *Kirmeyer v. Kansas*, 236 U. S. 568 and *Western Union Tel. Co. v. Speight*, 254 U. S. 17.

(b) None of the contentions here advanced have any application to the Line A gas. Appellees apparently admit the necessity for the transportation and use of that gas (Brief, 51).

(c) The figures submitted by appellees deal with annual averages in the transportation and use of Oklahoma gas. This is not the proper way to determine whether it is necessary for appellant to transport Oklahoma gas to Texas. *The proper test is peak demand.* The uncontradicted evidence shows that in

times of peak demand these Oklahoma lines are operated to capacity. The capacity of Line H is 50,000,000 cubic feet per day. Line 2nd H has the same capacity. Line G has a capacity of 55,000,000, making a total daily capacity of 155,000,000 (II, R. 1490). The witness Schmidt testified as to the peak demand use of these lines:

"Q. Has the Company actually transported that amount of gas through those lines in recent years?
"A. They have.
"Q. On a daily basis?
"A. Yes, sir.
"Q. Has the utilization of Line A, Line H, Line 2nd H, and Line G been necessary to enable the Lone Star Gas Company to supply the gas required for industrial and domestic consumption by consumers in the numerous towns and cities supplied at wholesale by it in the State of Texas?
"A. They certainly are.
"Q. In times of extreme cold weather are all of those facilities needed to supply the demands put upon the public service facilities of the Company?
"A. In times of severe cold weather those lines are carried to capacity." (II, R. 1490-1491.)

In view of this undisputed testimony it is clear that appellees have wholly failed to convict appellant of being engaged unnecessarily and even fraudulently in interstate commerce in connection with its transportation from Oklahoma to Texas.

Appellees in their discussion of this subject travel outside the record and state that one of the Oklahoma lines has been taken up since the trial in the State court (Brief, 49-50); and also that appellant has constructed certain new lines (Brief, 52). We

will not reply to these obviously improper statements.

The Court will further note that in their discussion of this subject appellees repeatedly refer to the Plea in Abatement Record—a record that constitutes no part of the statement of facts heard at the trial on the merits. All references to pages 215 to 230 are to that record.

V.

Discussion of Various Matters Relied Upon by Appellees as Being Sufficient to Deprive the Oklahoma and Panhandle Gas of Its Interstate Character.

Appellees in their Points XVI and XVII assert that, even if the Oklahoma and Wheeler County gas is transported to Texas in interstate commerce, "yet the treatment of such gas by appellant" in certain particulars, after it arrives in Texas "constitutes a breaking of the original package" and "the bringing of the interstate movement to a rest" (Brief, 21; also 55, 61). The various points here made will be briefly discussed.

(1) *Withdrawals from line.*

Appellees refer to the withdrawals from the main trunk line as constituting what they call a "breaking of the original package" with the result that when the first withdrawal takes place the remaining mass constitutes a "broken package" brought to rest within the State of Texas. (Brief, 59-60.) Referring to

Line A, appellees point out that the first Texas delivery made out of Line A after it reenters Texas is the delivery made to the West Texas Utilities Company (III, R. 1693, 1695). They assert that the delivery "breaks the original package" and brings to rest in Texas not only the gas thus delivered but all of the other gas remaining in the trunk pipe line and moving forward under high pressures to Texas city gates for delivery. (Brief, 60.)

If appellees are right in their contention that the making of a single city gate or other wholesale delivery brings to rest, not only the gas delivered to the distributing company or other wholesale buyer, but also the gas remaining in the trunk pipe line, then *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298, was wrongly decided. And the same is true of *State Tax Commission v. Interstate Natural Gas Co.*, 284 U. S. 41, and the other cases that have followed *Missouri v. Kansas Natural Gas Company;* supra, p. 2. This is in effect what the appellees contend. Under this line of argument the first city gate delivery would be an interstate delivery, while all the subsequent city gate deliveries, although made in the same way, would constitute intrastate deliveries.

(2) *Fort Worth Distributing System.*

Appellees also refer to the reduction of pressure that takes place in the local distributing system at Fort Worth—the only distributing system operated by appellant (Brief, 59). It is asserted that the local service at Fort Worth necessitates pressures as low as 4 to 6 ounces per square inch (Brief, 59), and this is referred to as a fact showing that all of ap-

pellant's pipe line gas is brought to rest in Texas. As to this it is submitted:

(a) Appellant's local distributing operations at Fort Worth are not involved in this proceeding; only its pipe line operations are involved. Its local distributing system and operations at Fort Worth were expressly excluded from consideration by the Commission. (I, R. 15.)

(b) The reduction in pressures here referred to takes place in the local distribution system and not in the trunk pipe line. The gas that remains in the trunk pipe line is not reduced in pressure.

(3) *Other Deliveries from Trunk Pipe Line.*

In the same connection appellees refer to the commercial and industrial sales made by appellant from its trunk pipe line and to the sales at farm taps (Brief, 59). The prescribed rate does not apply to these sales; it applies only to the city gate deliveries intended for domestic consumption. Even if it be assumed that appellant is engaged in intrastate commerce in making any or all of the sales mentioned that does not mean that appellant is also engaged in intrastate commerce in making the city gate wholesale deliveries to the distributing companies in the manner shown by the evidence.

It appears to be appellees' position that appellant has assumed the burden of showing that it is not conducting any intrastate activities in Texas. Appellees assert that appellant is conducting numerous intrastate activities and refer to the maintaining of a general office at Dallas, Texas. Appellees' position is plainly shown by its repeated citation of and reli-

ance on the opinion of this Court in *Southern Natural Gas Corporation v. Alabama*, 301 U. S. 148, Preliminary Print. That case is not applicable here because there the Gas Company was assailing a tax levied against it for the privilege of doing a local business in Alabama measured by the property it owned in that State, and the question was whether the business thus conducted in Alabama was "entirely an interstate business." (301 U. S. 154, Preliminary Print.) Here the question is whether a part of appellant's business done in Texas constitutes interstate commerce. If so, the order is void because it is inseparable and indivisible in form and in substance, and in virtue of the findings purportedly sustaining it. (Appellant's main brief, 97-104.) It may be assumed that appellant is engaged in intrastate commerce in carrying on the local business of selling and distributing gas to consumers in Fort Worth; and even that it is engaged in intrastate commerce in making the industrial and other sales along its line referred to by the appellees. This does not change the fact that appellant is also engaged in interstate commerce in transporting gas in high pressure trunk pipe lines through and from the State of Oklahoma for sale and delivery in wholesale quantities at city gates in Texas and Oklahoma.

These various withdrawals from the line are effective to bring to "rest" the gas withdrawn from the trunk line, but they are without effect on the gas remaining in the trunk line. These withdrawals do not even stop the movement of that gas. If appellees are right, then if an interstate car of wheat were shipped to Texas, parts of it being consigned to pur-

chasers at different cities, the entire mass of wheat would be brought to "rest" upon making the first delivery from the car within the State.

Missouri v. Kansas Natural Gas Co., supra, and *State Tax Commission v. Interstate Natural Gas Co., supra,* are both distinguished by appellees upon the untenable ground that in both cases "the whole volume of gas was transported from another State" (Brief, 41). Here it is sufficient that a part of the gas sold and delivered at city gates in Texas, and affected by the challenged order, is transported through or from another State. That appellant may be making other sales in a different way and, in virtue of such sales and other activities, may be engaged in part in intrastate commerce is beside the issue.

(4) *Storage of Gas.*

Appellees refer to the storage of gas by appellant on the Miller Farm lease near Petrolia (Brief, 60-61). This is discussed in appellant's main brief, 107-108. It may be assumed that this stored gas is brought to "rest" in Texas, but that is not the question involved here. The question is whether the gas that is not stored is also brought to rest so as to become intrastate gas. In discussing this stored gas, appellees ignore the fact that none of the gas from Line G is stored; as well as the fact that only a small part, if any, of the Line A gas is stored (II, R. 1478); and the fact that approximately one-half of the Line A gas is consumed by deliveries made by appellant at city gates in Texas north and west of the Miller Farm Lease—that lease being located near Petrolia.

The rate order applies to all of the gas delivered at city gates in Texas, including the gas that is not stored as well as the gas that is stored and including even the gas that is consumed before arriving at Petrolia.

The rate order, as we have pointed out in the main brief (93-104), is an indivisible legislative act. It is clearly void as to gas that is not stored, and, being indivisible, it is entirely void.

(5) *Use of regulators and meters.*

Appellees refer to the use of regulators by the appellant in making deliveries to the distributing companies, whereby the pressures are reduced from the high trunk line pressures of 150 to 350 pounds to low pressures of 20 to 30 pounds per square inch (Brief, 21).

The manner in which the pressures are reduced, as well as the purpose of the reduction made in delivering the gas at the city gates, is correctly detailed in the undisputed testimony of the witness Schmidt, quoted in appellant's main brief, 24-26. The reduction is made for the purpose of effecting delivery; for the purpose of reducing the pressures to a point where a delivery into the smaller distributing lines will be safe. The reduction is merely an incident to the delivery of the gas. Such a reduction in pressure was held to be without effect in *State Tax Commission v. Interstate Natural Gas Co.*, 284 U. S. 41, 43, and also in *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, 468, 470. The purpose of the reduction is explained in the East Ohio Gas Company opinion, 283 U. S. 468. In *State Tax Commission v. Interstate Natural Gas Company, supra*, the reg-

ulators and meters were owned and operated by the pipe line company. An argument like the one here presented was grounded on that fact. (284 U. S. 41, 42.)

There can be no interstate transportation without delivery at the end of the journey, and a reduction in pressures does not change the interstate character of the gas.

Appellees refer to contractual provisions which they interpret as requiring a reduction in pressures before the gas is delivered (Brief, 58). These provisions, thus interpreted, merely emphasize the purpose of the reduction—to effect a safe and suitable delivery.

Appellees refer to an inaccurate statement made on page 106 of appellant's brief in respect to the ownership of the regulators used in reducing pressures. This statement gives undue effect to the language of the contracts between appellant and the distributing companies requiring the distributing companies to install and maintain regulators and authorizing appellant to make deliveries at operating pressures. (These provisions are quoted in appellant's brief, 24.) Appellees now point out that there is a prior reduction made by the appellant immediately before the gas is metered. See the testimony of the witness Schmidt (appellant's main brief, 24-26). We accept Mr. Schmidt's testimony as correct, as apparently do the appellees. In making the criticised statement we did not intend that it should be construed as being in conflict with his testimony. At all events, the error in the statement criticised is an immaterial one. The record shows without

conflict that any reduction in pressures made by the appellant is made in connection with the act of delivering the gas and only for the purpose of effecting the delivery.

(6) *Gasoline Extracting Plants.*

As to the effect of the running of the Oklahoma gas through gasoline plants at Gainesville and Petrolia, we refer to our main brief, 105-106. The uncontradicted evidence shows that this process does not interrupt the movement of the gas (Schmidt's testimony, quoted in appellant's main brief, 32).

Appellees state that the witness Schmidt admitted that "the extraction process changes the B. T. U. content of the gas." (Brief, 57.) This is a partial interpretation of the testimony of the witness on the point. He testified:

"The heating value is lowered by possibly three per cent, but that is not the entire facts of the matter, because most of these hydro-carbons would condense in the lines anyhow, and you would have the same condition, besides giving us considerable operating troubles; these gases freeze up and cause stoppages in the line." (II, R. 1479.)

On the same point see his testimony, II, R. 1591-2.

Appellees state that the gas "coming through Line A is run through a gasoline extraction plant at Hollis, Oklahoma." (Brief, 57.) If running a gas through such plant brings it to rest, as appellees now contend, then all of this Line A gas is brought to rest and becomes intrastate gas at Hollis, in the State of Oklahoma, and then moves forward to Texas city gates as interstate gas.

(7) *Shifting of Flow of Gas by Appellant.*

In Proposition XVI appellees contend that when the gas leaves the Wheeler County field and the various fields in Oklahoma its destination is not known or determined in advance, and that it may be "shifted at the will of appellant to whatever destination may suit its own whim and fancy," and that appellant is in a position to thus defeat all regulatory authority (Brief, 20).

It is true that appellant does not know what destination in Texas or Oklahoma will be reached by any particular identified unit in quantity of the gas. But it does know that all of the gas not consumed in Oklahoma will be transported through and from Oklahoma into Texas, and that the city gate deliveries will be made in wholesale quantities with no reduction in pressure except that needed to effect the delivery.* Taking the Line A gas: Appellant knows the quantity going into the line and the quantity arriving in Texas, as well as the quantity delivered at every city gate in uncommingled state from the time it reaches Texas until it arrives at Petrolia, where it is there commingled with Oklahoma gas. This commingling is immaterial to a correct determination of the commerce issue (appellant's main brief, 74-76).

Of what effect is the fact that the exact quantity

*The argument here made by appellees, as well as that grounded on the fact that the title does not pass until the gas arrives at the city gates, was made in *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 300, 301, 306, and in *State Tax Comm. v. Interstate Natural Gas Co.*, 284 U. S. 41, 42.

delivered at any particular city gate is not known? The prescribed rate is uniform and it is known that all of the gas will be delivered at some city gate and will be subjected to the prescribed rate.

There is no "shifting back and forth" of gas in appellant's lines, except in rare cases of line breakage or other emergency.* In the general course of business, gas in a gas pipe line moves forward in a single direction. The witness Schmidt was interrogated by the District Court on this point. We quote as follows from his testimony:

"The Court: Now, so everybody will understand me, I understand you to say now, as far as you know, there is no line in which and through which gas some days moves south into Texas and on other days in the same line is moved north into Oklahoma?

"A. That is correct.

"Q. Of course, in the case of a line break or an emergency gas can be transported north through the pipe line?

"A. Yes; it can move in any direction in the case of an emergency." (II, R. 1471.)

Schmidt also testified:

"Q. Now, then, Mr. Schmidt, is it your testimony that no gas ever travels north from Texas into Oklahoma in either Line H or Line Second H?

"A. That is correct.

"Q. Never does?

"A. Except under extreme conditions or emergencies; such as a break in the line some place north of the river; and we have to take gas up there to

*It will be noted that some of the record references made by appellees are to the "Plea in Abatement Record," Brief, pp. 55-56, supra, pp. 5-7.

supply perhaps Temple, or some town in the south of the state of Oklahoma.

"Q. There have been times, have there not, when gas has moved North into Oklahoma from Texas thru those lines?

"A. To my knowledge, that has never happened.

"Q. Do you know about it?

"A. Yes, I know.

"Q. Are you positive what you are talking about?

"A. Yes.

"Q. And you are willing to say that at no time has there ever been a movement in either Line H or Line Second H, north from Texas into Oklahoma?

"A. That's right.

"Q. Now, on Line G, which is the next line east of H and Second H, I believe you say that gas has passed from Texas into Oklahoma through that line?

"A. Well, the same thing is true there as of Line H. It would only be in the case of an emergency.

"Q. Well, has there ever been any movement of gas from Texas into Oklahoma?

"A. Well, I believe on that line there has been at times, when gas moved into Oklahoma.

"Q. There has been on Line G?

"A. Yes, but it was only in case of a break, and lasted for a very short time." (II, R. 1475-1476.)

Appellees state that the witness Dunn testified "that he is the sole person who determines where the supply of gas shall be withdrawn or purchased, and where it shall be directed to in the 4,000 mile system of the company," and they assert that this gives the company, acting through him, the power "to shift its withdrawals and transportation from day to day, and from hour to hour" (Brief, 56). The testimony of the witness does not support this statement. We quote:

"Q. Mr. Dunn, as Production Engineer, are you primarily responsible for the proration of production in the field and proration of purchases in the field, and, in the last analysis, for the amount of gas taken from the several fields which supply the Lone Star Gas Company's pipe line system?

"A. Yes, sir, that is part of my duties. I am responsible for the amount of gas which is produced, when applied to the requirements. In other words, I have no control over the demand, but I am responsible for the production of the gas to meet that demand, as obtained from the separate fields and the separate wells, and so forth, which includes the proration of that gas in the individual fields and from the separate sources of supply." (I, R. 531.)

The entire import of this is that Mr. Dunn is charged with the responsibility of producing or purchasing enough gas to meet the demand. There is no support here for the statement that he or any other officer of the company may shift its withdrawals and transportation back and forth (Brief, 56). It is a matter of common knowledge that it is impossible from a practicable standpoint to transport and handle gas in the manner described by appellees.

VI.

Corporate Affiliation—Reply to Appellees' Points IV to VI, Inclusive.

Appellees contend that appellant pipe line is not engaged in interstate commerce in transporting gas through and from Oklahoma for sale and delivery in wholesale quantities at city gates in Texas because it is affiliated with all of the distributing companies

excepting two (Brief, pp. 7-12). The State court held that corporate affiliation was of no controlling importance in determining the commerce issue (V, R. 3343).

This contention is discussed in appellant's main brief, 83-97. We briefly supplement what is there presented.

Appellees admit that the Commission, for obvious reasons of convenience, elected to proceed separately and independently against appellant pipe line company in order that it "could in one hearing, fix a final uniform gate rate for the entire system in Texas, and later build the burner tip rates upon same after hearings as to the distribution operations only" (Brief, 38), instead of proceeding separately against the distributing companies to fix burner tip rates, in which proceedings the pipe line rate would have been only indirectly involved as an expense item. They admit that the order in question "is a final, binding and conclusive legislative act fixing the rate to be charged by the pipe line company and paid by the distributors of gas delivered at the city gates" (Brief, 38).

The State court found that the rate order in question was "a final appealable order" (V, R. 3345) and that if the prescribed rate "is declared valid herein" appellant can have no further interest in any order the Commission may make "in requiring the distributing companies to pass the reduction to the consumers" (V, R. 3349-3350). The Commission asserts that in fixing burner tip rates it will insist "that the applicable gate rate has been finally and conclusively fixed by the present order" (Brief, 39).

An applicable statute subjects appellant pipe line company to heavy penalties for failing to obey the order, the penalties amounting to not less than $100.00 nor more than $1,000.00, each violation being regarded as a separate offense and each day calling for a separate penalty. *Article 6062, Texas Revised Statutes of 1925.*

It thus appears that the Commission has made and proposes to enforce the order against appellant as a separate corporate entity engaged in the gas pipe line business and subject to the statutes that apply to gas pipe line companies, including the statute that authorizes the Commission to fix their transportation rates. *Article 6053, Texas Revised Statutes of 1925.* The Commission has elected to proceed separately against the distributing companies in fixing burner tip rates.

It is true that the State court held that appellant and its affiliated distributing companies were engaged in an "integrated but single business enterprise of producing, purchasing, transporting, delivering and selling natural gas for domestic or other use to the ultimate consumer" (V, R. 3342). But the State court further held that this single business enterprise was divided into "departments" and that appellant, separately organized as a pipe line corporation, was operating one of the departments and the affiliated distributing companies another and different department. It held that appellant in its department was "engaged in producing and purchasing natural gas and in transporting same by its 4,000 mile pipe line system from the point of production to the city gates of some 270 cities and

towns in Texas, where the gas is delivered to one and the other affiliated distributing companies." (V, R. 3340.) It held that the distributing companies in their "department" were "engaged in selling and delivering the gas to the burner tips of the consumers" (V, R. 3340).

Accordingly, the Commission proceeded against the appellant as a separate "department"—that is as a pipe line company. It asserts that it proposes to proceed against the distributing companies operating their separate department—and as distributing companies.

In these circumstances, it is manifest, as was declared by the State court in its opinion, that corporate affiliation "is not of controlling importance on the commerce issue" (Appellant's brief, 84). See *Smith v. Illinois Tel. Co.*, 282 U. S. 133, 143-144. For further discussion see appellant's brief, pp. 83-97, inclusive.

Appellees, on page 39 of their brief, refer to certain contentions which it is claimed appellant has made in other suits and hearings after this suit was tried. These statements are outside the record and for that reason are not discussed.

DIVISION TWO.

The Segregation Issue—Discussion of Appellees' Points XX to XXIV, Inclusive.

Appellees in their discussion of the segregation question wholly fail to meet the issues tendered by the appellant—issues that clearly arise because of the rulings made by the State court (Appellant's

main brief, 110-124). Instead, appellees discuss issues that are clearly immaterial in view of the rulings made by the State court. Appellant is content to stand on the discussion presented in its main brief supplemented by the following:

(1) At the outset it may be pointed out that the entire argument here, as elsewhere, is grounded upon the assumption that appellant is not entitled to the benefit of any evidence in the record except that sponsored and offered by the appellant. It assumes that the rate order must stand if appellant failed to offer evidence sufficient to show that the rate was confiscatory, even though evidence showing that it was confiscatory, and coming from some other source, is in the record. As to this, see, for example, appellees' "General Thesis" on page 85 of their brief.

Appellees cite no authorities in support of their contention that the evidence supporting a judgment annulling a rate must come from the party who assailed the rate. It is clearly sufficient, we submit, that the invalidating evidence is in the record. In this case evidence and computations based thereon, covering various phases of the confiscation issue, came from three sources: First, the Commission's detailed findings were put in evidence for the consideration of the jury; next, there was evidence offered by the appellant; and, finally, evidence offered by the appellees. It was clearly open to the jury, in dealing with any particular phase of the confiscation issue—for example, with the fair value of appellant's public service properties—to accept all or any part of the evidence coming from any one

of these sources and to blend that evidence with other evidence coming from a different source.

(2) Appellees criticise at length appellant's segregation of its properties and business as between interstate and intrastate commerce (Appellees' brief, 65-76). The criticism is pointless because appellees claim that their segregation, in effect approved by the Court of Civil Appeals, was a proper one (Appellees' brief, 75); and appellant has demonstrated that when the validity of the rate order is tested on the basis of that segregation and in the light of other evidence that the jury was entitled to accept, and presumptively did accept, the rate order is clearly confiscatory (Appellant's main brief, 119-124).

It will be noted that appellees make no effort to answer that argument.

(3) In this case the State court ruled that appellant was not engaged in interstate business at all in making the city gate deliveries in Texas. It further ruled that appellant's confiscation evidence was legally worthless because of its alleged failure, by its evidence, to make a proper segregation as between its interstate and intrastate operations. These two rulings are obviously inconsistent; both cannot stand. If the Court of Civil Appeals meant that appellant was engaged in intrastate business in Texas and in intrastate business in Oklahoma and that it was necessary to make a segregation as between the Texas properties and operations and the Oklahoma properties and operations, then it is sufficient to point out that that segregation was made by the

appellees and was accepted by the State court and that the prescribed rate, when considered in the light of that segregation and other evidence that the jury was entitled to accept, is clearly confiscatory. (Main Brief, 121-124.)

(4) Here the prescribed rate applies to all of the Texas business. The order as drawn is indivisible and inseparable (Appellant's main brief, 97-104). Appellees assume that it was appellant's duty to segregate its city gate deliveries in Texas so as to separate and identify the interstate deliveries and the intrastate deliveries at all the city gates in Texas (Appellees' brief, 27, 30-31). No such burden devolved upon appellant. It was not the duty or even the right of appellant to rewrite the rate order. The order applied to all of the deliveries in Texas and the appellant is entitled to have the validity of the order tested in the light of that fact. If appellant had made the segregation, the order would have stood unmodified.

This is not a case like *Smith v. Illinois Telephone Co.*, 282 U. S. 133, 148. There, the order as drawn was divisible and separable in its operation. It expressly applied only to the intrastate part of appellant's business. The question, therefore, was simply one of segregating, not the order, but the properties and operations, in order to test the reasonableness of the rate that was properly limited in its application to the local business. That was also true in the other cases cited by the appellees: The rate as prescribed was a local rate, and the segregation required was of the properties and op-

erations. None of these cases hold that the party assailing a rate must assume the burden of offering evidence that would enable the reviewing court to rewrite the order.

The necessity for a segregation of properties and operations in any case is to identify the property used and useful in rendering the service to which the rate applies, to the end that it may be determined whether the revenues accruing under the prescribed rate will afford a fair return on the properties used in rendering the service. The rate order here applies to all of the city gate deliveries made in Texas. There was therefore no necessity that appellant, disregarding the terms of the order, should separate the property used in making these deliveries into two parts on the theory that part of the deliveries were interstate deliveries.

(5) Appellees refer to the map appended to appellant's brief and make the charge that this is the same map that was appended to appellant's brief in the Court of Civil Appeals and to its application for writ of error in the Supreme Court of Texas, but with certain colored zoned areas and delineations thereon obliterated; and the Court is invited by appellees to examine the map to determine if this is not true (Appellees' brief, 73-74). The map appended to appellant's brief is the same map that was appended to the briefs referred to by appellees and the colored zoned areas and other delineations have been removed. This was done because the present map is presented for a wholly different purpose. It is presented and is referred to in the brief

solely for the purpose of showing "the location of appellant's lines in Oklahoma and Texas" (Appellant's brief, 5). On the other hand, the map appended to the State court briefs was presented to show by colored zones and delineations a segregation of appellant's properties and operations as between interstate and intrastate commerce. These colored zones and delineations were eliminated because they had no relation to the purpose for which the present map is tendered; it is tendered merely to show the geographical location of appellant's lines. This map is also based on two other maps introduced in evidence and appearing in the record (V, R. 3206A and 3208A). Many maps are in the record, including one designed to show a segregation of appellant's properties and operations. The record affords ample basis for the preparation of a map designed to serve the limited purpose of the map attached to appellant's brief. We were there discussing simply the question of whether appellant was engaged in interstate commerce and endeavoring to show nothing except the location of its lines with reference to the State line between Oklahoma and Texas.

DIVISION THREE.

Denial of Adequate Judicial Review.

(1) Appellees assert that appellant, on page 126 of its brief, has admitted that it was not denied an " 'independent judgment as to the facts' by the District Court, or by the Court of Civil Appeals." (Appellees' brief, p. 76.) Appellant submits that nothing contained in its brief warrants this statement.

(Appellant's main brief, 126-127.) Appellant's complaint, as stated in its brief, is that the procedure provided by the State, as expounded and applied against it in the instant case, denied it a judicial review of the rate order. It specifically complains of "the judgment of the Court of Civil Appeals, which, in effect, deprived appellant of the judicial review accorded to it in the trial court and placed it in the same position as if that review had been denied by the trial court." (Appellant's brief, 127.)

(2) Appellees undertake to interpret the opinion of the Court of Civil Appeals and to restate its rulings on the question of judicial review. (Appellees' brief, 77-81.) The opinion speaks for itself. The court clearly held that the conflicting testimony of "equally well qualifitd experts" was insufficient as a matter of law to sustain a judgment setting aside a rate order as confiscatory, and that this is true even where the conflicts have been settled by the verdict of a jury or other fact finding agency. In this case the State court expressly found that the evidence on vital phases of the confiscation issue was conflicting. (Appellant's main brief, 124-125.) Because of the existence of these conflicts, it held that the verdict and judgment of the district court, settling the conflicts against the validity of the order, should be reversed and judgment should be rendered sustaining the rate order, this being upon the theory that conflicting evidence is insufficient as a matter of law to sustain an attack on a rate order. The court cited in support of its ruling cases decided by this Court, holding that a judgment *sustaining* a

rate order will not be set aside where the evidence for and against the order is conflicting and the conflicts have been settled in favor of the order. It is manifest that the decisions cited by the court, instead of supporting its conclusion, are in conflict with its conclusion. (Appellant's main brief, 131-132; also 135-136.)

(3) It is asserted by the appellees that this case differs from *United Gas Public Service Co. v. State* (the Laredo case), decided February 14, 1938, because there the jury finding imported that the rate was not confiscatory; whereas, here, the verdict does not import that the rate is confiscatory. (Appellees' brief, 84.) It is pointed out in this connection that there is a difference between an unreasonable rate an a confiscatory rate. (Brief, 84.) That such a difference exists is true, but that fact is immaterial here. The State District Court required the jury to find whether the prescribed rate as applied against appellant was "*unreasonable and unjust*" to the appellant. The jury was charged in this connection that an unreasonable and unjust rate was one "so low as to have not provided for a fair return upon the fair value of defendant's property used and useful in supplying the service furnished by said defendant." (Appellant's main brief, 16.) The jury's answer in the affirmative, interpreted in the light of the charge, means that the prescribed rate was so low that it would not yield a fair return on the fair value of appellant's property, and was therefore confiscatory. *Board of Public Utility Commissioners v. New York Tel. Co.*, 271 U. S. 23, 31; *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 41.

DIVISION FOUR.

I.

The Confiscation Issue—Discussion in Reply to Division C of Appellees' Brief, pp. 85 to 206.

Appellant in Point V, submitted in its brief and the discussion thereunder, attempted to demonstrate that the finding of the jury that the rate was confiscatory is sustained by clear and satisfactory evidence—evidence that the jury was entitled to accept, and presumptively did accept, as true. Further, that the Court of Civil Appeals, without making any contrary finding of fact on the issue of confiscation, set aside the verdict of the jury and the judgment of the District Court approving the verdict and rendered judgment sustaining the rate order; and that this ruling of the Court of Civil Appeals was based simply on an erroneous conclusion upon a question of Federal constitutional law. The question of law erroneously decided by the court related to the quantum and character of evidence that is required to sustain a judgment setting aside a rate order challenged as being confiscatory (Appellant's main brief, pp. 134, 135-170).

In discussing this point appellant referred to many bases of fact, supported by evidence in the record, that the jury was entitled to accept, and presumptively did accept, and showing that the rate was confiscatory (Appellant's main brief, pp. 147-170; also 34-50).

Appellees make no attempt to meet the issue thus tendered. Instead, they have gone over the record

and selected other and different items of evidence and have presented these in their discussion and in the attached tables for the purpose of showing that the rate was not confiscatory. They ignore the fact that the work of selecting and blending different parts of the evidence had already been done by the jury. They have hand picked the evidence, ignoring the fact that it has already been hand picked by the jury. They have selected parts of the evidence unfavorable to the verdict and presumptively rejected by the jury, and blended these rejected parts in an effort to show that the rate was not confiscatory. The proper approach to this problem, as we believe, is to determine whether there is substantial evidence in the record that the jury was entitled to credit and then to select and blend in such a way as to support its finding that the rate was confiscatory. We approached the problem in that way in our main brief and we think our approach was correct.

The only findings of fact made on the confiscation issue in this case were made by the jury, with the approval of the District Court. The Court of Civil Appeals made none. Where the Court of Civil Appeals reverses the judgment of the District Court based on a finding of fact and renders judgment, it determines, not a question of fact, but a question of law. "Its ruling is therefore one purely upon a question of law—whether there be any evidence under the quantum of proof required which will support the jury's finding. *Tweed v. Telegraph Co.*, 107 Tex. 255, 166 S. W. 696, 177 S. W. 957." *Briscoe v. Bright's Adm'r.*, 231 S. W. 1084, 1085 (Tex. Com. App.). This was said in a case where an applicable

rule of law required that the evidence should be "clear and satisfactory." The court held that the conclusion of the Court of Civil Appeals that the evidence was not "clear and satisfactory," followed by the rendering of final judgment, amounted to no more than an erroneous conclusion on a question of law.

This results from the fact that the Court of Civil Appeals has no power "to make an original final determination of a question of fact." *Choate v. San Antonio & A. P. Ry. Co.*, 91 Texas 406, 410. It is because "it is not the province of the Court of Civil Appeals to determine a question of fact in the first instance." *Patrick v. Smith*, 90 Texas 267, 274. The Supreme Court of Texas has defined the fact finding power of the Court of Civil Appeals in *Post v. State of Texas*, 106 Texas 500, followed by this Court in *United Gas Public Service Co. v. Texas*, decided February 14, 1938. We quote as follows:

"The province of determining questions of fact is in the trial court. The Court of Civil Appeals has the power to set aside its finding and remand the cause for a new trial. Where the evidence is without conflict, it may render judgment. But where there is any conflict in the evidence upon a material issue, it has no authority to substitute its findings of fact for those of the trial court. Choate v. San Antonio & A. P. Ry. Co., 91 Texas, 406, 44 S. W. 69."

This is in line with the generally accepted rule that a holding that there is "no evidence" or no legally sufficient evidence is a holding on a question of law; it is not a finding of fact. *Creswill v. Grand Lodge K. of P.*, 225 U. S. 246; *Northern P. R. Co. v.*

North Dakota, 236 U. S. 585; *Union Pacific R. Co. v. Huxoll*, 245 U. S. 535; *Jones National Bank v. Yates*, 240 U. S. 541; *United Gas Public Service Co. v. State*, decided February 14, 1938.

All that the Court of Civil Appeals did here was to determine what "quantum and character" of evidence is legally sufficient to support a judgment setting aside a rate order as being confiscatory. Its holding on that question of law was to the effect that conflicting evidence is not enough. It was to the effect that where the evidence sustaining a judgment, annulling a rate order, consists merely, as the court described it, of the "conflicting testimony of equally well qualified experts" on the issue of fair value of the utility's property and other vital issues, it is insufficient as a matter of law to sustain the judgment, even though such evidence may have been accepted as true by the triers of fact. The Court, without denying the right of the jury, well established under the Texas rule, to resolve the conflicts in the evidence in the ordinary case, held that, under a general rule of law, claimed by the court to be supported by the decisions of this Court, this function cannot be exercised by any court in a rate case; and that its exercise by the jury in this case should be ignored. The Court held that the presence of conflict required that the issue of confiscation be decided against the complaining party without settling the conflict.

The Court does not find that the verdict of the jury was wrong on the facts. The Court had no power to make a finding of fact contrary to that made by the jury and then render final judgment, and did not

claim or attempt to exercise such power. All the Court did was to apply a wrong legal test in determining the legal sufficiency of the evidence on which the jury verdict was based.

The question of law thus determined is one arising under the Fourteenth Amendment. It is plain, we submit, that the question was erroneously decided. The decisions of this Court were erroneously interpreted and applied (Appellant's main brief, 135-139). The State court erroneously assumed that because conflicting evidence is not enough to require the reviewing court to set aside a rate order that conflicting evidence is also not enough, even when the conflicts have been settled by the triers of fact, to support a judgment annulling the order. No applicable decision of this Court supports this ruling.

The State court cites decisions of this Court holding that it will not reverse a judgment sustaining a rate order where the evidence as to the validity of the order is conflicting. These decisions fall short of holding that where the conflicts in the evidence have been resolved by the triers of fact against the validity of the order, their action will be reversed and the order sustained, notwithstanding their findings, merely because the evidence is conflicting.

We submit that the findings of fact made by the jury in this case, with the approval of the trial court, should be accepted in this Court if they are sustained by clear and satisfactory evidence that the jury was entitled to accept. The record should be reviewed solely for the purpose of determining whether it contains such evidence; and if such evidence is found, then it should be conclusively presumed that it was

accepted by the jury. The action of the Court of Civil Appeals in reversing the judgment of the District Court should be ignored because it is based, not on a contrary finding of fact, but only on an erroneous ruling on a question of constitutional law.

The ruling of this Court in *Jones National Bank v. Yates*, 240 U. S. 541, is applicable. In that case, as in this one, the findings and judgment of the trial court were overturned and reversed by the appellate court of the State. In that case it was "apparent that there were no findings of fact by the Supreme Court of the State," (p. 551). The court said that "the questions of fact, so far as they arose upon a substantial conflict in the evidence, were for the trial court." That it was not necessary for the court to review the evidence in detail, it being "sufficient to say that our examination of it has convinced us that the findings of the trial court at least with respect to the last mentioned reports had substantial support; and, in this view, we must conclude that the reversal of the judgments, as entered in the trial court, upon the ground of the legal insufficiency of the plaintiffs' case when tested by the Federal statute, was error." (P. 563.)

Here the Court of Civil Appeals has expressly held that the evidence was conflicting on vital issues relating to the ultimate issue of confiscation (Appellant's main brief, 124-125.) These conflicts have been settled by the jury. The Court of Civil Appeals has not denied the right of the jury to settle the conflicts, but has announced and applied as a general rule of constitutional law, that conflicting evidence

is insufficient as a matter of law to support a judgment annulling a rate order.

A jury verdict entered in a State court falls under the Seventh Amendment when a Federal court is invited to re-examine the findings of fact evidenced by the verdict. *Chicago, etc., Ry. Co. v. Chicago*, 166 U. S. 226, 246. The case of *Minnesota & S. L. R. Co. v. Bombolis*, 241 U. S. 211, cited by the appellees is not in point because the re-examination of the verdict in that case was in a State court, and the Seventh Amendment does not apply to a re-examination by a State court.

In *United Gas Public Service Co. v. State*, decided February 14, 1938, this Court, in defining the scope of its review of the evidence, said:

"This court will review the findings of fact by a State court (1) where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts."

The court further said:

"We make that anlaysis, not to determine issues of fact arising on conflicting testimony or inferences, and thus to usurp the function of the State court as a trier of the facts, but to perform our own proper function in deciding the question of law arising upon the findings which the evidence permits. Kansas City Southern Ry. Co. v. Albers Commission Co., supra.

"Here, the issues of fact were determined in the

trial court. Counsel agree that under the state practice the Court of Civil Appeals had no authority to make findings of fact. 'Where the evidence is without conflict, it may render judgment. But where there is any conflict in the evidence on a material issue, it has no authority to substitute its findings of fact for those of the trial court.' "

Applying the rule thus announced, we understand that this Court will, in passing upon the ruling of the Court of Civil Appeals, review the findings of fact made by the State trial court. It will do this because the legal conclusion of the Court of Civil Appeals as to appellant's Federal right and the findings of fact of the District Court are so intermingled at to make it necessary to a proper determination of the Federal question to consider the facts. But in analyzing the facts, the Court will not determine the issues of fact that arise on conflicting testimony. It will not usurp the function of the jury and trial court as the triers of fact.

In discussing the confiscation issue in our main brief, we proceeded in the light of these rules that we believed to be correct. We have not supposed that this Court would review the evidence *de novo* for the purpose of determining whether the conflicts in the evidence may be settled in some way different from the way in which they were resolved by the jury. We have attempted in the main brief to show that there was substantial evidence in the record sustaining the jury's finding—evidence that, if accepted by the jury as true, would satisfy the test of being "clear and satisfactory" (Appellant's main brief, 154-170).

Appellees have proceeded in an entirely different way. They present points of argument that properly could have been addressed to the jury. They discuss alleged fallacies in "appellant's evidence" and emphasize the merits of "appellees' evidence." They proceed upon the theory that the evidence as a whole was divided into two separate and independent parts; and that the jury had no right to take evidence offered by appellant and blend it with evidence offered by the appellees.

Presumptively, the jury heard and considered the criticisms of appellant's evidence now offered by appellees. It determined that these criticisms were without merit or that, if any particular part of the evidence was not entitled to be accepted there was other evidence coming from other sources that properly could have been accepted.

Appellees assail appellant's reproduction cost new estimate and its evidence on reserve accruals for depreciation, depletion and amortization, and other items. It is sufficient to point out that the jury was not bound by any of this evidence. The jury was entitled to consider appellant's evidence, appellees' evidence, the findings of the Commission, and other relevant facts in arriving at its ultimate conclusion on the issue of confiscation. What parts of the evidence, whether sponsored by appellants or by appellees, were accepted by the jury and what weight the jury gave to any particular evidence is unknown. The nature of the charge submitted to the jury makes it impossible to determine now what particular phase or phases of the evidence influenced the jury in arriving at its verdict. But this fact is im-

material. What is material is that the jury's conclusion is supported by a reasonable interpretation and possible blending of all of the evidence introduced before it.

The five tables attached to appellees' brief illustrate very clearly the erroneous way in which they have considered the evidence in connection with the jury's verdict. These tables are plainly based upon a selection of items of evidence that the jury was entitled to reject, and presumptively did reject, to the extent that any particular item may be in conflict with the verdict.

What appellees have done is to demonstrate quite clearly that there were conflicts in the evidence to be resolved by the jury, and therefore that there was sufficient evidence of probative force and effect to justify submitting the case to the jury and to support the verdict of the jury finding that the rate was confiscatory.

We submit therefore that appellees' computations prove nothing material here (1) because of the fact that there is other evidence in the record which sustains the verdict of the jury rejecting the theories outlined in these computations; and (2) because of errors inherent in the computations.

We now briefly consider appellees' tables:

(1) *Appellees' Table I (Brief, 196).*

Under column 1 of this table appellees attempt to show that appellant from 1927 through 1933 would have received an average rate of return of 8% on the rate base adopted by the Commission, as shown by its findings. It is obvious that these figures are

based upon a hand picked selection of certain parts of the evidence that the jury possibly had the right to accept but presumptively did not accept. In preparing this and the other tables appellees blend the different parts of the evidence in a way not favoring the verdict, ignoring the right of the jury to blend the evidence in a way favoring the verdict.

In respect to each of the items shown on this table there was evidence of different items more favorable to the verdict. For example, the rate base is taken from the Commission's findings. There was evidence upon which the jury could have based a finding of a much higher rate base (Appellant's brief, 166-170).

The computations presented in Table I are based upon an allowance of reserve accruals approximating 2% a year, ignoring the fact that there was evidence favoring a larger allowance.

The rate base which the Commission found for the year 1927 through 1930 ranged from $29,517,879.08 to $46,745,646.84. This accords with the book costs for those years as appears under item 5, appellees' Table II (Appellees' brief, 197). The evidence shows that the book costs do not include cash working capital and going concern value. It also shows that all overhead construction costs were not capitalized. The record shows that the books understated the actual costs of the property (Appellant's brief, 37). The book costs ranged from $48,409,002.24 in 1931 to $50,399,110.82 for the twelve months ended March 31, 1934 (Appellees Table II, brief, 197), whereas the rate base figures used in Table I, $46,246,617.53 for 1931 and

$46,520,137.06 for 1932, represent the Commission's determination (I, R. 110-111). If the book costs be used as the rate base for the years 1931 and 1932 and the Commission's allowance for annual reserve accruals in the amount of 2.09% be used, the amounts available for Federal taxes and return would be 5.66% for 1931 and 5.84% for 1932, instead of the figures shown in Tables I for those years (I, R. 110-111).

For the year 1933, Table I shows 5.20% available for Federal income taxes and return. This figure was arrived at by adding to the actual revenues received during that year the sum of $441,240.12, which admittedly appellant did not receive but which appellees claim would have been received if weather conditions had been normal and more gas had been sold. It is obviously improper to test the effect of the 32 cent rate when applied to the year 1933 by anything other than the actual experience—actual revenues and expenses. *West Ohio Gas Co. v. State Tax Commission*, 294 U. S. 79. If the $441,240.12 thus added to actual revenues be eliminated and only the actual revenues used, the amount available for Federal taxes and return will be 4.29% on the rate base used in Table I instead of 5.20%. When applied to the actual cost of the property for the year 1933, the amount available for Federal taxes and return would be 4.11%.

Column 2 of Table I purports to include earnings from Government and Northern Natural Gas Company. None of the accountants who testified in this connection included such alleged revenues in their accounting exhibits.

(2) *Appellees' Table II (Brief, 197).*

It is at once apparent that the amounts shown to be available for return on this table were arrived at after allowing only *$344,871.84* for annual reserve accruals to provide for depreciation, depletion and amortization. This amounts to .71% for 1931, .70% for 1932, and .68% for 1933, on the book costs. This figure is 65% below the amount allowed by the Railroad Commission. The Commission allowed $983,698.43 for depreciation and depletion on the sinking fund basis, which requires an undepreciated rate base (I, R. 97, 98, 99). Appellees' alleged expert estimated $848,546.48 for depreciation and admitted that at least $94,000.00 for depletion of the production system properties would be required on the Texas properties alone, making a total of $942,546.48 (Appellant's brief, 47-48). This estimate was made on the sinking fund basis and he testified that with the application of this rate an undepreciated rate base should be used (III, R. 1829). This is the lowest figue suggested by any witness or shown by any evidence in this case for reserve accruals. The amount used in Table II for depreciation, depletion and amortization is 63% of the above figure. It is apparent that appellees themselves in the District Court trial did not rely on the figure $344,871.84 for depreciation reserve accruals. They should not now ask this Court to accept a figure which they themselves did not rely upon.

By the use of this figure of $344,871.84, appellees show 6.77% for the year 1931, 6.90% for the year 1932, and 5.46% for the year 1933, available for return on the book costs. If the Commission's allow-

ance for depreciation, depletion and amortization be used for the years 1931, 1932 and 1933, the following percentages are available for return on the book costs shown in Table II, to-wit; 1931, 5.45%, 1932, 5.61%; 1933, 4.19%.

Appellees have deducted the figure $344,871.84 for reserve accruals in computing the amount available for return for each year from 1927 through 1933, inclusive, although their own table shows that the book costs of the property increased from $29,517,879.08 for the year 1927 to $50,399,110.82 for the year 1933, an increase of $20,881,231.74. This increase represents additions to property over a seven-year period. It is obvious that depreciation, depletion and amortization requirements will increase as the property account increases. Appellees give no consideration to this elementary fact. Appellees also ignore the important fact that mortalities on the new property afford no measure of the requirements for reserve accruals to meet the increasing mortalities as the property grows older. They entirely disregard the newness of the property and the fact that reserve charges in past years are no measure of future requirements for which a reserve must be currently built up. (See facts mentioned in Appellant's main brief, 149-154.)

In the above computation Federal income taxes have been calculated on the basis used by appellees in their Table II. This basis is in fact erroneous. In computing Federal income taxes appellees have used a rate of 5% per annum for depreciation (see Note 4, Table II, Appellees' brief, 197). But in computing amounts available for return they used

.71% for 1931, .70% for 1932, and .68% for 1933, for depreciation reserve accruals. The inconsistency in using one rate for depreciation in computing return and another rate in computing Federal income taxes is obvious.

The result shown by application of the 32¢ rate for prior years is immaterial. The rate was promulgated September 13, 1933, and was based upon appellant's operating experience for the year 1931. Its effect, when applied to actual operating experience, is fairly and adequately demonstrated when applied to the years 1931 through March 31, 1934. Appellant claims that the 32¢ rate would not have afforded it a reasonable return at the date of its promulgation and for a reasonable period of time in the future. Earnings of the past cannot be used to support the rate. If it be confiscatory at the date of promulgation and when applied to the future, it is unconstitutional. *Los Angeles Gas & Electric Co. v. Railroad Commission*, 289 U. S. 287, 313; *Board of Com. of New York v. New York Telephone Co.*, 271 U. S. 23, 31, 32; *Bluefield Water Co. v. Public Service Commission*, 262 U. S. 679.

(3) *Appellees' Table III (Brief, 198).*

What has been said above with respect to appellees' Table II is applicable, in principle, to Table III. In Table III appellees allow $296,589.78 as a deduction from operating revenues for annual accrual to reserves for depreciation, depletion and amortization. Appellees' expert at the trial in the District Court admitted that $942,546.48 would be required for the Texas properties alone.

If depreciation reserve accruals be computed at the $942,546.48 figure, the amounts available for return on the basis shown in Table III would be 5.97% for 1931, 6.10% for 1932, and 5.10% for 1933.

(4) *Appellees' Table IV (Brief, 199).*

Appellees' Table IV is a reproduction of their Exhibit 8 (III, R. 2164). This is the exhibit and showing upon which appellees ultimately relied in the District Court trial in an effort to support the Commission's order.

The fallacies of this exhibit have been alluded to in appellant's main brief, pp. 47-50, 159-165.

This table represents, as do the others, a selection by the appellees of certain phases of the evidence and is based upon the assumption that the jury was compelled to make this particular selection as against some other selection in harmony with and supporting the verdict.

If Table IV, being appellees' Exhibit 8, is corrected so as to provide for actual expenses of operation on the Texas properties, exclusive of management fees, and if appellant's appraisal is corrected to include the production system properties in Texas at actual cost, and increases in prices for material on the transmission line equipment alone, as admitted by appellees' expert, be allowed for in the rate base, and if an allowance is made for depletion in the amount admitted by appellees' expert, the amounts available for return for 1933 would be 4.60% and for the twelve months ended March 31, 1934, 5.02%. The following tabulation demonstrates these results:

	3-31-34	12-31-33	
Net Revenues	$ 3,608,172.77	$3,420,665.19	(1)
Exp. (Prod. Sys.) III, 2116A	222,752.66	232,758.70	(2)
Available for Depr. Fed. Tax and Return	3,385,420.11	3,187,906.49	
Depr. & Depl. ($48,-546.08, incl. correction & $94,000 depletion, B.163)	942,546.08	942,546.08	(3)
Avail. for Fed. Tax and Return	2,442,874.03	2,245,360.41	
Fed. Income Tax	97,534.45	96,073.64	(4)
Available for Return	2,345,339.58	2,149,286.77	
Rate Base	$40,256,862.39		(5)
Increase in prices 1-1-33 to 6-15-34	1,269,688.28		(6)
Prod. System prop. in Texas	5,191,539.42		(7)
TOTAL rate base	46,718,090.09		
Percentage	5.02%	4.60%	

(1) Appellees' Ex. 8, Table IV, Brief 199.
(2) Expenses, production system, Appellees' Ex. 4, III, R. 2116A.
(3) Depreciation and depletion. (See Appellant's main brief, 163.)
(4) Federal income tax, Appellees' Brief, 199.
(5) Rate base, Appellees' Ex. 8, Table IV, Brief, 199.
(6) Increase in prices, Appellant's main brief, 161.
(7) Production system properties at cost, Appellees' Ex. 4, III, R. 2125.

(5) *Appellees' Table V (Brief, 200).*

The computations in this table, like those in the other tables, are not reliable. It is apparent therefrom that appellees have added to actual revenues

for the entire system $441,240.12 as "temperature correction." This temperature correction means that appellees have added to actual revenues the sum stated on the theory that the weather in the year 1933 was warmer than usual, and that if it had been normal appellant would have earned that much more money. There is deducted from the amount shown in the table to be available for depreciation and return, the sum of $848,466.08 for annual reserve accruals. This is appellees' estimate for depreciation reserve accruals on the Texas properties alone, and includes nothing for depletion of and depreciation on the production system properties in Texas. Appellees allow for reserve accruals on the entire integrated operating system estimated for the Texas properties alone. (Appellant's main brief, 163.) The actual cost rate base used in the table includes production system properties but the amount allowed for annual reserve accruals provides nothing for depreciation and depletion on these properties. On this basis appellees show a return of 5.55% on the integrated operating system. If they had used the actual revenues, eliminating the $441,240.12 added as temperature correction, and had used the Commission's allowance for annual depreciation reserve accruals for the entire system, the amount available would have been 4.35% instead of 5.55%.

The allocation to "D" operations of 6.63% for return shown in the table, was arrived at by the application of some sort of percentage formula. Appellant did not make its segregation between interstate and intrastate commerce on the basis of an arbitrary formula, or by the application of ratios or percent-

ages. Its segregation was based upon the way and manner in which the property was used and operated. (Appellant's main brief, 43.) Appellant's Exhibit 46 shows 3.78% available for return on the fair value of the property allocated to intrastate operations, exclusive of going value, after allowing for reserve accruals at the rate of 2% per annum, being the approximate rate allowed by the commission. (Appellant's main brief, 43-44.) Management fees were included in the calculation of expenses by which this percentage was determined. If the management fees be eliminated, the amount available for return is 3.99% instead of 3.78%.

All of the tables presented in appellees' brief (196 to 200, incl.) represent appellees' blending of various and sundry phases of the evidence in an effort to show that the 32¢ rate is compensatory. Appellees nowhere attempt to demonstrate in connection with any of these tables that the jury was compelled to select and blend the evidence in the way represented by these tables, or any one of them. The very fact that appellees have presented five blendings of the evidence is enough to suggest that probably other blendings were available, and this is affirmatively shown in appellant's main brief, pp. 164-170. At most, appellees have done no more than to show that probably a verdict and judgment in their favor might have been sustained. They have wholly failed to show that there is no "clear and satisfactory" evidence showing that the rate order was confiscatory. They have wholly failed to show that the state of the evidence was such that the jury was compelled to accept one of the blendings of the evi-

dence now brought forward by the appellees. We think it should now be assumed, in deference to the jury's verdict, that these same blendings of the evidence were put before the jury and the trial court by the appellees. The verdict should be interpreted as the definite rejection of these blendings of the evidence in favor of other blendings of it that will support the verdict.

When appellees' criticisms are considered in the totality of their consequences, the evidence still clearly supports the conclusion that the 32¢ rate is confiscatory. Granting these criticisms, for the sake of argument only, we shall now demonstrate by the following table of figures that, upon the basis of the evidence in the record, other than that assailed by appellees', the rate is shown to be confiscatory.

REVENUES, EXPENSES AND AMOUNTS AVAILABLE FOR RETURN

Based on 32¢ Domestic Gate Rate and Operating Expenses as Set Out by Commission

Depreciation and Depletion as Testified to by Appellees' Witness

	Dec. 31, 1931	Dec. 31, 1932	Dec. 31, 1933	Mar. 31, 193
Amount Available for Depreciation, Depletion, Federal Income Tax and Return (Note 1)	3,765,160.24	3,978,890.81	3,093,567.60	3,293,167.05
Depreciation and Depletion (Note 2)	942,546.08	942,546.08	942,546.08	942,546.08
Amount Available for Federal Income Tax and Return (Note 3)	2,822,614.16	3,036,344.73	2,151,021.52	2,350,620.97
Federal Income Tax (Note 4)	216,627.86	256,841.59	145,744.27	175,769.90
Amount Available for Return (Note 5)	2,605,986.30	2,779,503.14	2,005,277.25	2,174,851.07
Rate Base No. a (Note 6)	48,506,490.31	50,764,182.38	50,566,776.74	50,602,511.77
Rate Base No. b (Note 7)	50,252,481.96	50,252,481.96	50,252,481.96	50,252,481.96
Amount Available for Return (Note 8)				
Base a	5.37	5.48	3.97	4.30
Base b	5.19	5.53	3.99	4.33

Note 1. Appellant's Ex. 13 (III, R. 2283-2285; also 2297-2303). The revenues are based on the 32¢ rate and the operating expenses have been adjusted to conform to the Commission's eliminations, averages and adjustments. Management fees have been excluded. Donations allowed by the Commission have been included. Regulatory expenses have been amortized over a ten-year period. Dry hole and canceled and surrendered lease expenses have been amortized as the Commission amortized them.

Note 2. Appellees' estimate for annual reserve accruals. See appellant's main brief, 163. This figure covers the amount appellees' witness admitted would be required for depreciation and depreciation reserve accruals on the Texas properties only. It is applied here to the integrated operating system because it is the estimate made by appellees at the trial in the District Court. It is less than the Commissions' allowance for the whole property. The Commission allowed $968,066.98 for depreciation and $15,631.45 for depletion. (I, R. 97-99.)

Note 3. Calculation.

Note 4. Federal income taxes calculated at prevailing rates, after deduction of interest payments. Depreciation and depletion have been taken at the rate estimated by appellees' witness. See Note (2).

Note 5. Calculation.

Note 6. Actual book cost as shown at pp. 36-37 of appellant's main brief, less actual cost of the Petrolia field property, in the amount of $758,619.23 (Appellees' Ex. 4, III, R. 2125). This book cost includes general construction costs in the amount of $739,958.75 as of 12/31/33. All of such costs were not capitalized on the books (I, R. 348-351). The Commission allowed $4,528,968.30 for construction overheads, being administration and legal expense, engineering and supervision during construction, taxes during construction, interest during construction, and preliminary and organization expense (I, R. 47-52). Cash working capital has been added to

the actual book cost in the amount allowed by the Commission, $1,488,369.91 (I, R. 52.)

Note 7. This represents appellants' appraisal of the physical properties, less accrued depreciation, in the amount of $55,809,205.16 (Ex. 37, V, R. 3037); from which undistributed general costs and general supervision in the total amount of $8,932,012.77 have been eliminated (Ex. 37, V, R. 3038-3039). There is also excluded appellant's appraisal of the Petrolia field in the amount of $687,781.13. Collateral construction costs and working capital have been included in the amount allowed by the Commission, being $6,017,337.16 (I, R., 47-52). Developed leaseholds have been included at actual cost less depletion, as allowed by the Commission, in the amount of $727,442.54 (I, R. 71-72). Undeveloped leases have been included at actual cost, as included in appellant's appraisal, in the amount of $893,291.28 (V, R. 3038).

Note 8. Calculation.

The above is not presented on the theory that the jury and trial court were compelled to accept these figures. In every instance there was evidence in the record, more favorable to the verdict, that the jury might have accepted.

II.

Reply to Various Contentions and Statements of Appellees.

To specifically answer all the various points of argument presented by appellees would unduly extend

the length of this brief. We shall attempt to discuss only a few of the points made by appellees. Notwithstanding our inability to cover all of the points, we do not wish to be understood as assenting to appellees' interpretations of the evidence or the conclusions they draw therefrom.

Appellees assail principally "the item of depreciation reserve; next, the questioned items of operating expense; then the elements in the rate base; the rate of return; and, last, the operating computations submitted by the company and compared with those in * * * * our tables I to V, inclusive." (Appellees' brief, 100.)

We now discuss some of the points made by the appellees.

(1) *Depreciation Reserve Accruals.*

Appellees enter upon a lengthy discussion of the annual accruals to depreciation, depletion and amortization reserves in an effort to show that the allowances claimed by appellant's witnesses were unreasonable and their testimony incredible (Appellees' brief, 103-116). We might dismiss this subject by simply pointing out that the computations submitted by appellant's witnesses on this phase of the confiscation issue might be rejected and the computations submitted by appellees' witnesses accepted and still there would be ample evidence in the record clear and satisfactory in nature and showing that the prescribed rate is confiscatory. This has been fully demonstrated in our main brief, as hereinbefore pointed out.

This argument rests upon the unsupported assumption that if the jury was not entitled to accept the evidence offered by appellant on this issue, it was not entitled to accept evidence on any other issue. Appellees' points made here are more or less abstract. Everything they say could be admitted and still the verdict would find ample support in the evidence.

In the interest of an accurate presentation of the facts we will briefly reply to appellees' discussion of this question. We have set out in our main brief (149-158) facts and reasons which refute the argument now presented by appellees. We now supplement that discussion.

Appellees compare appellants' determination of per cent condition of new of the property with the balance in the reserve account at December 31, 1933 (appellees' brief, 104-105). They refer to the fact that appellant determined the over-all per cent condition to the 94.26%. They overlook the important fact that the per cent condition of the physical properties was 92.93%. This was equivalent to approximately 7% at the date of inquiry, or $4,245,384.00, being the difference between the reproduction cost new of the physical properties and the present value at January 1, 1933 (appellants' Exhibit 37, V, R. 3037). The balance in the reserve account must provide for this loss in value and represent free capital available to appellant. *Board of Public Utility Commissioners v. New York Bell Telephone Co.*, 271 U. S. 23, 70 L. Ed. 808.

Appellees' argument ignores the important fact that reserve accruals must provide for mortalities

brought about by causes other than decline of per cent condition. The reserve accruals must provide for removals, replacements, abandonments and amortization of property. In a natural gas producing and pipe line property, removals are occasioned by changes in sources of supply, changes in operating conditions and other factors which cannot be definitely anticipated. The Commission, with respect to the appellant's depreciation reserve, said that: "Inasmuch as the depreciation reserves actually set up by the company are substantially in the correct amount and are substantially the same as the sinking fund method of handling depreciation requires, the ratio of the book value to the book cost may serve as a fairly accurate basis of correcting the return above 6% to a depreciated rate base." (I, R. 114-115.)

Although the first property was installed in 1909, at the date of inquiry it had a weighted age, owing to the installation of a large percentage of new property in recent years, of only twelve years (III, R. 1860, 2041-2042). Other facts pointed out in appellants' original brief show the newness of the property at the date of inquiry. (Appellant's brief, 38-39.) Appellees argue that at the date of inquiry and notwithstanding the newness of the property, it had reached a static age (appellees' brief, 106). The record which is cited in support of this statement does not, in our opinion, support it (appellees' brief, 106, II, R. 1142-1143, 1171, 1183, V, R. 3037).

Appellees' own evidence disputes this contention. Appellees Exhibit No. 7 (III, R. 2160) shows a rate for replacements of 1.01% at the twelfth year.

The replacement rate is shown to increase from 1.01% in the 12th year to 3.43% in the 42d year. If the property was in the 12th year at the date of inquiry, it is obvious that the replacement rates or mortality rates had not become static. This is evident from appellees' own evidence. The 33 1/3 year average life curve shown in appellees' Exhibit No. 7 (III, R. 2162 C) and upon which appellees base their estimate for reserve accruals, shows that the peak in replacements is scarcely approached at the twelfth year. Hence, it cannot be plausibly argued that mortalities of the past and charges against reserve occasioned thereby are a fair measure of the mortalities which will be experienced as the property grows older.

Appellees say that appellant's witness in making his estimates for annual reserve accruals gave no consideration to credit balances currently building up during the earlier life of the property (appellees' brief, 106-108). This is an inaccurate and erroneous statement. In appellant's Exhibit No. 42 Connor states that "as in the case of the calculations from main lines and tap lines, a uniform annual accrual designed to provide the necessary annual funds indicated by the application of the adjusted total annual rates to the reproduction cost of field lines and well lines will create a credit balance during the earlier years of the accrual. The use of this credit balance, and the interest earned upon it, will tend to reduce the indicated amount of the uniform annual accrual." (V, R. 3123.)

The method employed by appellant's witness in estimating depreciation and depletion reserve ac-

cruals for gas reserves and gas well equipment is not open to the criticisms leveled thereat by appellees (Appellees' Brief, 110-112). The explanation made by the witness Connor in appellant's Exhibit 42 is sufficient to refute appellees' claims. (V, R. 3131, 3153.) Appellees vigorously assail the estimate of 20,000,000 M. cubic feet as the average annual rate of future deliveries from appellant's gas reserves. This estimate has a factual basis (V, R. 3136-3140).

Total gas deliveries by years were as follows, to-wit:

Year	M. cu. ft.
1927	38,469,319
1928	36,692,761
1929	42,777,847
1930	40,916,774
1931	34,628,020
1932	33,191,917
1933	30,838,394
1934	31,874,619

(Appellees' Ex. 5, III, R. 2126B.)

In view of appellant's total annual deliveries since 1927, we do not agree with appellees that it is unreasonable to suppose that in the future appellant will use 20,000,000 M. cubic feet per annum from its own reservoir.

Although appellant has not in the past obtained that high a percentage of its total gas deliveries from its own reserves, the facts set out in appellant's Exhibit No. 42 show why it will be necessary for appellant to draw more heavily upon its own reserves in the future. As illustrative, in 1927 appellant

obtained 17,641,453 M. cubic feet of gas from casinghead gasoline plants. Gas available from this source has declined from 100% maximum delivery in 1925 to 30.9% in 1932. In 1932 the deliveries of gas obtained from these casinghead gasoline plants were only 10,324,783 M. cubic feet. Other factors making for a decline in the amount of gas obtained from sources other than appellant's own reserves are shown in the record (V, R. 3135-3143).

(2) *Questioned Operating Expenses:* Appellees eliminate from the operating expenses or criticize various items which were included by the Railroad Commission and which were not assailed at the trial in the District Court (Appellees' brief, 116-130). They eliminate from their various computations management fees and charitable donations, and criticise the inclusion in the expense account of uncollectible bills, regulatory commission expense, dry hole expense, canceled and surrendered leases, new business expenses and Federal income taxes. These expenses are proper and were incurred in good faith by the management. (Appellant's main brief, 40.) The only item of expense excluded by any witness produced by appellees at the trial were the management fees. The reasonableness of none of the other items of expense now challenged by appellees was assailed in the District Court. "In all the pages of this record, there is neither a word nor a circumstance to charge the management with fault." There is no basis in the record for the elimination of the small expenses for donations, uncollectible bills and the reasonable sums expended for dry hole expense, cancelled and surrendered leases and new business ex-

pense. "Good faith is to be presumed on the part of the managers of a business * * *. In the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as the measure of a prudent outlay * * *." *West Ohio Gas Co. v. Public Utilities Commission (No. 1)*, 294 U. S. 63, 79 L. Ed. 761; *Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U. S. 276, 67 L. Ed. 981; *Lehigh Valley Ry. Co. v. Board of Public Utility Commissioners*, 278 U. S. 24, 73 L. Ed. 161.

(3) *Rate Base:* Appellant disagrees with appellees' statement that it did not use quoted prices for pipe and material and deduct all available discounts in the preparation of its appraisal (I, R. 640-641; II, R. 842-843). Appellees state that immediately after the date of appellant's appraisal, appellant purchased eleven carloads of pipe at prices very substantially lower than were used in the appraisal (appellees' brief, 132-133). Appellees make no reference to the record in support of this statement. The record does show that in 1933, appellants purchased 6,300 feet of 24-inch pipe at $2.0328 per foot (II, R. 902). The pipe thus purchased was not included in appellants' inventory and appraisal. It was purchased at a distress sale (II, R. 905-906). This pipe was not in standard condition when it was purchased and appellant was required to recondition it (III, R. 2045-2046). Appellees point to none of these important facts. They say that a striking example of the inflation injected into the prices used by appellant in its appraisal was the purchase of the aforesaid pipe "of the highest quality" at prices very

substantially lower than those used in the appraisal (Appellees' Brief, 132).

Appellees say "that the company and the commission included in the rate base all production system properties, when plainly a very large part thereof was not actually used and useful in the present public service, and would not become useful at any reasonable or near period in the future * *" (appellees' brief, 145).

We think it obvious that the producing leaseholds, that is, leases which are actually producing gas, are used and useful in the public service. Appellant included undeveloped leaseholds in its appraisal at $893,291.28 (Appellant's Exhibit 38, V, R. 3038). This sum is reasonable on its face when the magnitude of appellant's system is considered. The evidence on this point is that in proportion to the investment and the volume of business done by appellant, the amount of its undeveloped leaseholds was relatively very small and barely sufficient to insure adequacy of supply. This evidence showed that the undeveloped leaseholds could be utilized in the future by appellant and that they may be regarded in the nature of working capital. They were included in the appraisal at actual cost (I, R. 654-655). The undisputed evidence shows that appellant's production system properties were used and useful in the public service (III, R. 2044, 2060).

Appellees state that appellant's developed reserves are sufficient at past rates of withdrawal to last from forty to sixty years. The evidence shows that appellant's gas reserves would last approximately twenty years (I, R. 531, 564).

Developed leaseholds were included in the Commission's rate base at actual cost less depletion (I, R. 69-72) and not at actual cost, as stated by appellees. (Appellees' Brief, 150.)

At page 153 of their brief, appellees invite us to include undeveloped and developed leaseholds in capital account at actual cost and include the cancelled and surrendered leases and dry hole expenses in operating expenses. Under appellant's method of handling dry hole and cancelled and surrendered lease expense they are charged to operating expenses, as suggested by appellees, and no reserve is created therefor. Developed and undeveloped leaseholds are capitalized on appellant's books at actual cost. This method of handling leaseholds, cancelled and surrendered leases and dry hole expense seems to conform to appellees' suggestion, although this method is criticized in other places of appellees' brief. This method received the approval of the Commission (I, R. 28-29; Leaseholds, Method 2, I, R. 69-72.) It is true that in its appraisal appellant included the developed leases at their appraised value in the amount of $2,681,689.00. (V, R. 3038, Appellant's Ex. 37.) Undeveloped leaseholds were included at actual cost in the amount of $893,291.28 (V, R, 3038; 3034-3034A). This makes a total value ascribed to leaseholds in appellant's appraisal of $3,574,980.28. If they be included in the appraisal on the basis used by the Commission in the amount of $1,991,613.92 (I, R. 69-72), being actual cost with the developed leaseholds depleted, it will occasion a reduction in appellant's appraisal of $1,583,366.36.

Appellees state that the Meridian Gas Company

properties, which were purchased by appellant January 1, 1932, at a cost of $1,338,406.21 (I, R. 460) were appraised by appellant in the present case at $173,079.00, which included gas reserves, gas well equipment, production property of every kind, and including all recovery operating costs. After this statement, appellees then conclude that it "clearly shows that the Lone Star Gas Corporation sold the properties to its subsidiary, the Lone Star Gas Company, for $1,300,000.00 plus, for the simple purpose of putting these properties in appellant's rate base * * *." (Appellees' brief, 155-156.) The statement is misleading. The evidence shows that the properties were purchased from Meridian Gas Company at the actual cash cost paid therefor by the Meridian Gas Company. (I, R. 460-461.) That these properties were purchased in good faith at a fair and reasonable price is not disputed by any evidence in the record. Appellant did not appraise the property at $173,079.00 as stated by appellees. This figure represents the appraised value of the reserves alone. The various items making up the properties so purchased are scattered throughout the appraisal and we have been unable, within the time available, to identify all of them. It seems sufficient to point out that of the properties purchased from Meridian Gas Company, gas reserves were appraised in the present case at $173,079.00 (V, R. 3032); gas well equipment at $578,148.78 (IV, R. 2369); gathering system rights-of-way at $702.00 (IV, R. 2378); Field measuring station structures at $3,473.48 (IV, R. 2371); measuring station equipment at $12,905.92 (IV, R. 2374); and field line equipment at $63,691.04

(IV, R. 2377), making a total of $832,000.22 for these items alone.

Appellees charge us with "affirmatively and deliberately misrepresenting to the court what the testimony was with respect to appellees' allowance for going concern value." (Appellees' Brief, 174.) It seems to us that the testimony quoted at pages 174 to 177 of their brief shows the correctness of the statement at page 145 of our brief. At page 176 appellees quote the testimony of their expert as follows:

"Q. If the property of the Company were to be reproduced as of June 15, 1934, and there was no business attached whatsoever, wouldn't your reproduction cost be the same as set forth in plaintiff's Exhibit No. 6?

"A. Yes, and that would be true whether it was 100 per cent saturation or whether there was no saturation at all, in view of the history of the Company, the way it was actually produced and the way it could be produced from the beginning again. There was no loss of return on idle plant during the history of the Lone Star Gas Company."

We think it apparent from this testimony, as well as other testimony referred to by us and set out in appellees' brief that no allowance for going concern value was included in appellees' appraisal. We therefore adhere to our original statement (Appellees' brief, 185).

(4) *Temperature Adjustments.* Appellees attribute to appellant, as regards the matter of temperature adjustments, a position inconsistent with the

decision of this Court in *Los Angeles G. & E. Corp. v. R. R. Comm. of California*, 289 U. S. 287. (Appellees' Brief, 185.) Such is not the case. Appellant does not challenge the right of the Commission to take into consideration abnormal weather conditions, as well as abnormal conditions of any kind as a basis for making its prophecy as to what a particular rate will yield in the future. It does object to what was done by appellees' witness in this case. Appellees' witness added to revenues actually received by appellant during periods when experience had spoken, $268,829.64 for the year ended March 31, 1934, and $441,240.12 for the year ended December 31, 1933, on the theory that if the temperature had been normal appellant would have received these additional estimated amounts which actually it did not receive. (III, R. 2165.) We do not understand that the Los Angeles case sanctions any such adjustment or is authority for the proposition that a rate shown to be confiscatory upon the basis of actual experience during the particular accounting period as to which the rate is sought to be enforced may be made compensatory by adding hypothetical revenues to revenues actually received. This Court has held that to shut one's eyes to actual revenues and to build a schedule upon guesswork with evidence available is an arbitrary action. It has said that: "A forecast gives one rate. A survey gives another. To prefer the forecast to the survey is an arbitrary judgment," and that, "present confiscation is not atoned for by merely holding out the hope of a better life to come." *West Ohio Gas Company v. Public Utilities Comm. of Ohio, (No. 2)*, 294 U. S. 79, 81-83.

(5) *Fair Rate of Return.*

Appellees' discussion of the evidence relating to a fair rate of return discloses the weakness of their position in respect to the verdict of the jury. (See appellees' brief, 180-183.) Appellees discuss the credibility of the witnesses who testified on this issue. They point out that two of the witnesses were agents of the company and that two were Dallas bankers, who, at different times, had made loans to the appellant. It is plain that all of these matters, affecting only the credibility of the witnesses, were to be determined by the jury.

As pointed out in the main brief, the entire issue of confiscation can be settled in favor of the verdict, by considering the conflict in the evidence on this issue and by recognizing the power of the jury to settle that conflict. (Appellant's main brief, 121.)

(6) *Criticism of Computations in Appellant's Main Brief:*

Appellees criticise the computations in appellant's brief, pp. 186-187, on the general grounds that they fail to take into consideration temperature corrections for alleged abnormal temperature periods, and fail to take into account increased consumption which would result from putting the reduced rate into effect. We have already pointed out the impropriety of considering other than actual revenues in testing the effect of the rate during the years to which it is applied and sought to be enforced.

It would be impossible on this record to take into

account any alleged increased consumption under the reduced rate. There is no evidence in the record upon which such an assumption could be based. Appellees themselves refer to no such evidence in the record. Such evidence as the record affords on this subject consists of an unsupported conclusion of appellees' witness. It affords no basis for an estimate or prophesy (III, R. 1813-1815). Upon the record as it comes to this Court, this would be guess work, and no more. "There has been no attempt to measure the possible enhancement by appeal to the experience of other companies similarly situated or by any other line of proof. Present confiscation is not atoned for by merely holding out the hope of a better life to come." *West Ohio Gas Co. v. Commission (No. 2)*, 294 U. S. 79, 82-83.

(7) *Appellees' Statement as to the Holding Company's Books.*

Appellees state that access to the holding company's books has always been denied the regulatory authorities of Texas. (Appellees' brief, 34.) Appellees' accounting witness testified that he was "afforded access to every book, record and account" of appellant; that he had never made any requests of the personnel of appellant in respect to the examination of its books which had been refused. (III, R. 1661.) This same witness testified under examination by his own counsel that he was refused access to the books of the holding company (III, R. 1880). He did not state what requests were made, nor to whom they were made. Appellees made no demands

upon appellant during the trial for the holding company's books and they issued no subpoenas or process therefor. He did not testify that his ability to ascertain all relevant facts concerning appellant's business and operations was prejudiced by his inability to examine the books of the holding company. We think it manifest from the record that no such prejudice resulted. Appellees' witness stated that he wanted to look at the books of the holding company in connection with the management fee charge (III, R. 1880). The only possible relevancy that an examination of the holding company's books could have to the issues in this case would be with respect to the item of management fees. These management fees were eliminated by the Commission (I, R. 25-28) and they may be eliminated from appellant's expenses of operation without altering the results.

(8) *Claim of Appellant's Non-Cooperation.*

Appellees claim that appellant's attitude "has been one of studied concealment and distortion of the facts, and non-cooperation, rather than one of candid revelation." (Appellees' brief, 96.) They say that an examination of the entire record will show this to be true. Our examination of the entire record fails to show any support for the claim. The testimony of appellees' witness above referred to, to the effect that he was afforded access to every book, record and account of appellant, refutes the claim. (III, R. 1661.) The Commission's findings negative the claim (I, R. 14-18).

(9) *Appelless' Claim of Misrepresentation as to the Inclusion of Gas Reserves in the Appraisal.*

Appellees state that appellant included in its appraisal all developed and undeveloped gas reserves and leasehold and that appellant's statement to the contrary on page 36 of its brief is "absolutely unfounded." (Appellees' brief, p. 144). Appellant's statement on page 36 of its brief was directed solely to appellant's Exhibit 30. In this exhibit appellant estimated gas reserves underlying "only proven and developed reserves." The statement is correct and has manifestly been misinterpreted by the appellees.

Respectfully submitted,

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